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No. 91-1818

In the Supreme Court of the United States

OCTOBER TERM, 1991

HAZEN PAPER COMPANY, *et al.*,
PETITIONERS,

v.

WALTER F. BIGGINS,
RESPONDENT.

ON CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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21

TABLE OF CONTENTS

		Page
I.	STATEMENT OF THE CASE	1
	A. The Case Below	1
II.	REASONS FOR DENYING THE WRIT	5
	The Decision Of The First Circuit Is Fully In Accord With Well-Established Principles Governing The Award Of Attorney's Fees Under Federal Fee-Shifting Statutes, And No Exceptionally Important Issue Of Law Is Presented By The Cross-Petition To Warrant Supreme Court Review	5
	A. The Courts Below Properly Applied Settled Law In Denying The Plaintiff's Demand For Fee Enhancement	6
	B. There Is No Precedent For Cross-Petitioner's Claim	11
	C. The Cross-Petition's Policy Arguments Provide No Basis For The Requested Reversal Of Settled Law	13
	D. The Record Below Cannot Support The Position Advocated By The Cross-Petition	15
	E. The Cross-Petition's Attempt To Ally The Present Case With Dague Is Wholly Without Merit	16
Conclusion		18

TABLE OF AUTHORITIES

Cases:

	Page
Blanchard v. *Bergeron*, 489 U.S. 87 (1989)	10, 11
Blum v. *Stenson*, 465 U.S. 886 (1984)	6
Dague v. *Burlington*, 935 F.2d 1343 (2d Cir. 1991), *cert. granted*, 112 S.Ct. 964 (1992)	*passim*
Evans v. *Jeff D.*, 475 U.S. 717 (1986)	6
Hamner v. *Rios*, 769 F.2d 1404 (9th Cir. 1985)	10
Hensley v. *Eckerhart*, 461 U.S. 424 (1983)	15
Johnson v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)	12
Laffey v. *Northwest Airlines, Inc.*, 746 F.2d 4 (D.C. Cir.), *cert. denied*, 472 U.S. 1021 (1985)	15
Pennsylvania v. *Delaware Valley Citizens' Council*, 483 U.S. 711 (1987) (*"Delaware Valley II"*)	*passim*
Pennsylvania v. *Delaware Valley Citizens' Counsel*, 478 U.S. 546 (1987) (*"Delaware Valley I"*)	4
Riverside v. *Rivera*, 477 U.S. 561 (1986)	11
Venegas v. *Mitchell*, 110 S.Ct. 1679 (1990)	*passim*

Statutes

29 U.S.C. § 626(b)	2

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I. Statement Of The Case

A. *The Case Below*

This case arises out of the termination of plaintiff Walter F. Biggins' employment with Hazen Paper Company ("Hazen Paper" or the "Company") in June, 1986. Plaintiff was discharged from his position as Technical Director of Hazen Paper, a small family-owned business located in Holyoke, Massachusetts, following his refusal to sign a confidentiality agreement required of him as a condition of continuing employment at the Company. The uncontradicted evidence at trial established that Hazen Paper demanded that plaintiff sign the confiden-

tiality agreement following its owners' discovery that — contrary to prior assurances he had given them — Biggins had been marketing consulting services of the type he performed for Hazen Paper to competitors of the Company.

At trial, plaintiff argued that the Hazens' articulated reasons for discharging him from employment were pretextual, and that their true motivation was to prevent his imminent vesting in the Company pension. The jury returned a verdict in favor of plaintiff, and awarded him $560,775.00 in compensatory damages under the Age Discrimination In Employment Act ("ADEA"). The jury also found the Hazens' purported violation of the statute to have been "willful." Accordingly, the District Court assessed an additional $560,775.00 in liquidated damages against the Company pursuant to Section 7(b) of the ADEA, 29 U.S.C. § 626(b).

On defendants' post-trial motion for judgment n.o.v., the District Court upheld the jury's finding of ERISA liability against the Company for interference with pension benefits, as well as age discrimination liability under the ADEA. However, the District Court held the evidence inadequate to sustain the jury's additional finding of willfulness, and struck the award of liquidated (double) damages previously assessed against Hazen Paper.[1]

After the verdict, plaintiff moved for statutory attorney's fees, seeking an enhancement of the "lodestar figure" (which plaintiff asserted to be $182,058.25) to $666,729.12, or one-third of the judgment on all counts (state law included) entered in the District Court. This enhancement, plaintiff argued, was warranted by the contingent nature of the representation provided by his trial counsel. In support of this motion, plaintiff submitted ledgers detailing the attorney hours worked on the case. Plaintiff also submitted an affidavit concerning his reten-

[1] On appeal, the First Circuit affirmed the judgment with respect to the ERISA claim. The court also affirmed the judgment as to the underlying ADEA liability, but reversed the lower court's entry of judgment n.o.v. against the jury's willfulness finding, and reinstated approximately $420,000.00 in liquidated damages.

tion of counsel. In his affidavit, plaintiff acknowledged that two of the four law firms he contacted before retaining trial counsel conceded that they were not competent to handle certain substantive aspects of his case. A third law firm agreed to take Biggins' case on a contingency basis with a modest retainer; and a fourth lawyer declined to represent Biggins because he felt the matter was too time-consuming for a sole practitioner. Finally, plaintiff submitted the affidavit of his chosen counsel, and those of two other local lawyers, each attorney stating that civil rights and ADEA cases in Massachusetts are typically undertaken on a one-third contingent fee arrangement.

After having "carefully examined the documentation" submitted by plaintiff in support of his motion for attorney's fees, the District Court recalculated the lodestar figure as $175,564.75, or $6,493.50 less than the amount claimed by plaintiff. This minor reduction reflected the court's determination that a lower hourly rate should have been applied to work performed on "non-core" matters. In its ruling, the court accepted plaintiff's use of present hourly rates in calculating the lodestar, but rejected cross-petitioner's demand that the lodestar figure be "enhanced" to the amount plaintiff agreed to pay trial counsel under his contingency fee arrangement, *viz.*, one-third of the total damages awarded.

In reaching this decision, the District Court surveyed the recent decisions of this Court addressing the issue of fee enhancement, and acknowledged plaintiff's affidavits concerning the prevalent use of private contingent arrangements in civil rights cases. In denying the requested enhancement, the court noted that Justice O'Connor (writing for herself and for four other Justices on this issue) had:

> "decided that while a district court could properly consider the contingent nature of a case when determining a reasonable attorney's fee under federal fee-shifting provisions *[Pennsylvania* v. *Delaware Valley Citizens' Council*, 483 U.S. 711, 731 (1987) *("Delaware Valley II")]*, a court

> may not enhance a fee award any more than necessary to bring the fee within the range that would attract competent counsel. *Id.* at 733. Likewise, the Court cannot adjust the lodestar due to the " 'legal' risk or risks peculiar to the case." *Id.* at 734. Neither may the Court consider the quality of the representation or the complexity of the case when considering adjustment of the lodestar. *Pennsylvania* v. *Delaware Valley Citizens' Counsel*, 478 U.S. 546, 565 (1987) ("Delaware Valley I"). Rather, the lodestar " 'is presumed to be the reasonable fee' to which counsel is entitled." *Delaware Valley I*, 478 U.S. at 564, citing *Blum*, 465 U.S. at 897.
>
> This case is not sufficiently rare or exceptional to justify an enhancement of the lodestar. The Court is satisfied that the lodestar adequately compensates counsel for the work provided in this action, and that an award of $175,564.57 is sufficient to attract competent counsel in the relevant market. Furthermore, the Court cannot, under the law or consistent with conscience, award an attorney's fee almost four times the amount of the lodestar. Such a departure would be an abuse of discretion in light of the frugal methods adopted in recent Supreme Court cases. In sum, because the Court finds that the lodestar figure embodies a reasonable attorney's fee within the meaning of the ADEA and ERISA, the Court will award plaintiff that amount." (App. at pp. 85-86.)

On cross-appeal, the First Circuit affirmed the District Court's denial of plaintiff's motion that his fee award be enhanced "to reflect the contingency of service — the risk involved of not getting paid." The First Circuit identified plaintiff's case as falling within that class of cases where fee enhancement is not necessary, *i.e.*, cases " 'where any plaintiff, impecunious or otherwise, has a damages case that competent lawyers would take in the absence of fee-shifting statutes.' *[Delaware Valley II, supra]* at 726 (plurality opinion)." (App. at p. 46.)

The Court of Appeals below noted that, under the analysis adopted by both the plurality opinion and the dissenters in *Delaware Valley II*, the issue of fee enhancement would arise only in cases where "'the damages likely to be recovered are not sufficient to provide adequate compensation to counsel, as well as to those frequent cases in which the goal is to secure injunctive relief to the exclusion of any claim for damages.' " (App. at pp. 46-47, quoting *Delaware Valley II*, *supra* at 726 (plurality opinion).) The First Circuit then concluded that in cases (such as the present one) where "the attorney has entered into a contingent fee contract in a suit seeking substantial damages," *id.* at 749 (Blackmun, J., dissenting), no enhancement is called for. The Court of Appeals found that, under the contingent contract into which he had entered, and without any enhancement of the lodestar, "Plaintiff's counsel, as he anticipated, will in fact be rewarded with a premium in excess of his normal hourly rates." (App. at p. 47.)[2] On that basis, the Court of Appeals denied plaintiff's motion for an enhancement to the lodestar used to determine his attorney's fee.

II. Reasons For Denying The Writ

THE DECISION OF THE FIRST CIRCUIT IS FULLY IN ACCORD WITH WELL-ESTABLISHED PRINCIPLES GOVERNING THE AWARD OF ATTORNEY'S FEES UNDER FEDERAL FEE-SHIFTING STATUTES, AND NO EXCEPTIONALLY IMPORTANT ISSUE OF LAW IS PRESENTED BY THE CROSS-PETITION TO WARRANT SUPREME COURT REVIEW.

The instant cross-petition attacks decisions of the District Court and First Circuit which are fully in accord with well-established principles governing the award of attorney's fees.

[2] As the First Circuit observed, plaintiff's contingent fee contract was not made part of the record. The First Circuit assumed, and cross-petitioner nowhere disputes, that such a contract exists, and provides for the payment by plaintiff to his attorney of one-third the damages recovered, without regard to such amount, if any, that may be awarded pursuant to a fee-shifting statute.

Far from abusing the discretion accorded them by federal fee-shifting statutes, the courts below properly applied well-settled law as to which the Supreme Court has recently (and, on this issue, unanimously) addressed itself.

Faced with decisions below that are unassailable, cross-petitioner has asked this Court to disregard several of its own recent decisions, and to adopt an extreme and unprecedented position that is apparently advocated by no state or federal court in the land. Moreover, cross-petitioner makes this extraordinary request on the basis of a factual record that is wholly unsuited to the task, even were the Court to accept cross-petitioner's unsupported legal premises. Finally, plaintiff's attempt to ally his cross-petition with a case from the Second Circuit to which certiorari has recently been granted is both wrong and misleading. Indeed, that case is distinguishable from the matter at bar on the basis of the *precise* legal principles identified by the First Circuit below and by this Court in *Delaware Valley II*. Far from suggesting the instant case as a certiorari-worthy companion for this Court to review, the Second Circuit's decision only further confirms the error of cross-petitioner's position.

The cross-petition identifies no important question of federal law, no split of opinion among the circuit courts, and no deviation by the First Circuit from the teachings of this Court. To the contrary, the decision of the Court of Appeals below adheres to a view of attorney's fee enhancement embraced by *every* Justice of this Court to have considered it. For these reasons, the cross-petition should be denied.

A. *The Courts Below Properly Applied Settled Law In Denying The Plaintiff's Demand For Fee Enhancement.*

The appropriate standard for review of an attorney's fee award is abuse of discretion. *Evans* v. *Jeff D.*, 475 U.S. 717, 742-43 (1986); *Blum* v. *Stenson*, 465 U.S. 886, 896 (1984). Far from having abused its discretion, the District Court below

applied well-established law in denying plaintiff's demand that the lodestar figure calculated by the court be "enhanced" to the amount of the contingent fee which plaintiff had agreed to pay his attorneys. In affirming this denial, the First Circuit correctly identified the critical distinction between the present case and cases such as *Delaware Valley II* and *Dague* v. *Burlington*, 935 F.2d 1343 (2d Cir. 1991), *cert. granted*, 112 S.Ct. 964 (1992). This distinction is between cases in which no enhancement is required to attract competent counsel, and cases where, without the prospect of such an enhancement, meritorious claims will not be pursued for want of counsel. That this essential distinction is ignored in the cross-petition provides no basis for the Supreme Court to grant review.

Cross-petitioner makes much of the division of this Court in *Delaware Valley II*, and the split among the circuits which followed in its wake, on the question of whether awards under federal fee-shifting statutes should be enhanced in *any* case to reflect the contingent basis on which legal representation was provided. Cross-petitioner, however, ignores the fundamental (and, for purposes of the cross-petition, dispositive) point on which this Court was *unanimously* agreed in *Delaware Valley II*. Namely, no enhancement is called for where the plaintiff and his attorney have entered into a private contingent fee contract (*i.e.*, one providing for plaintiff's attorney to be paid a percentage of the gross recovery, and not merely assigning to counsel the court-awarded fee) in a suit seeking substantial damages; because in such a case, the plaintiff's attorney has mitigated the risk of being paid nothing "by exchanging the risk of nonpayment for the prospect of compensation greater than the prospective lodestar amount." *Delaware Valley II*, *supra*, at 749 (Blackmun, J., dissenting).

The Justices of this Court are thus in complete agreement that the goal of the fee-shifting statutes, *viz.*, to enable "those who cannot pay a lawyer for his time and effort to obtain competent counsel," *id.* at 725 (plurality opinion), does not require enhancement "where any plaintiff, impecunious or otherwise,

has a damages case that competent lawyers would take in the absence of fee-shifting statutes." *Id.* at 726 (plurality opinion). Enhancement is only appropriate, even under the expansive view taken by the dissent in *Delaware Valley II*, where the attorney's sole (or primary) compensation will be the court-awarded fee itself. It is *this* kind of contingent arrangement (of the type found in *Delaware Valley II*, a case involving no damages award from which a private contingent fee might have been funded) which spawned division within the Court. As to cases like the present one, by contrast, where the potential damages are sufficient to attract competent counsel under a private contingency contract, and where payments under that contract are well in excess of the lodestar, the Justices of this Court have agreed without exception that no enhancement is appropriate.[3]

In identifying this critical distinction, the Justices of the Court have clearly held that "no enhancement for risk [of non-payment] is appropriate unless the applicant can establish that

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[3] Cross-petitioner argues that the First Circuit erred in citing Justice White's plurality opinion in *Delaware Valley II*, and that the First Circuit is thus in conflict with those circuits which have followed Justice O'Connor's concurrence. Cross-petitioner, however, misses the point that was correctly identified by the First Circuit. On the issue of whether an enhancement to the lodestar is required where the prevailing party and his attorney have entered into a private contingent fee agreement, the plurality and dissent of *Delaware Valley II* are in complete accord that enhancement is improper.

Cross-petitioner further argues that the First Circuit somehow misapplied this Court's holding in *Venegas* v. *Mitchell*, 495 U.S. 82 (1990), by looking to the award received by the plaintiff's attorney (rather than "what the losing defendant should pay", *see* Cross-Petition at p. 9) in determining that no adjustment to the lodestar was required. This suggestion by the cross-petitioner is mystifying. *Venegas* simply holds that a court award of fees poses no bar to an attorney's right to collect in full under a contingency contract. The Court in *Venegas* observed that if the court-awarded counsel fee established a cap on an attorney's compensation, competent counsel might be dissuaded from taking civil rights cases under private contingent contracts. Here, therefore, it is the cross-petitioner who disregards this Court's decision in *Venegas*, baselessly urging that the contingency award received by a plaintiff's attorney determine the reasonable counsel's fee which the defendant should be required to pay.

without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market,' " *id.* at 733 (O'Connor, J., concurring, quoting plurality opinion at 731). Typically, such "substantial difficulties" will be encountered where no damages are sought (as was the case in *Delaware Valley II* and in *Dague*, which had not yet reached the damages phase at the time of the fee award), or where the potential damages award would be inadequate to support a sufficiently attractive contingency contract. *See Delaware Valley II*, *supra*, at 744 (Blackmun, J., dissenting). As recognized by the First Circuit, such rare cases bear no resemblance to the case at bar, where the availability of substantial back-pay damages was more than sufficient to attract suitable counsel.

The distinction identified by this Court in *Delaware Valley II*, and properly applied by the First Circuit in the present case, unquestionably requires the denial of the cross-petition. Indeed, under the mandate of *Delaware Valley II*, an abuse of discretion *would* have been committed had the District Court awarded fee enhancement in a case where the plaintiff had "a damages claim that competent lawyers would take in the absence of the fee-shifting statutes", *id.* at 726 (plurality opinion), *i.e.*, a case where "the attorney has entered into a contingency fee contract in a suit alleging substantial damages". *Id.* at 749 (Blackmun, J., dissenting).[4]

[4] The cross-petition insists that the First Circuit has somehow erred in "reviewing the issue only in hindsight, by asserting that risk enhancement should be assessed after the case is concluded, on the basis of the size of the verdict." *See* Cross Petition at p. 9. Cross-petitioner again misstates the First Circuit's rationale in order to manufacture a conflict between the Court of Appeals' opinion and the teachings of this Court in *Delaware Valley II*. In noting that the plaintiff had achieved an award sufficient to fund a contingency fee contract that would attract competent counsel in future cases (as the prospect of damages before the verdict was sufficient to attract trial counsel), the First Circuit merely relied upon the distinction drawn by this Court to distinguish those cases where enhancement is necessary to the retention of counsel, from those where it is not. Likewise, the First Circuit's analysis of the trial outcome served to deflate the untenable suggestion in plaintiff's attorney's

In a substantial damages case such as the present one, this Court has recognized that the plaintiff does not "face[] substantial difficulties in finding counsel", and, therefore, "no enhancement for risk is appropriate". *Id.* at 733 (O'Connor, J., concurring).[5] As found by the courts below, the appropriate award of attorney's fees here is the traditional "reasonable attorney's fee", *id.* at 749 (Blackmun, J., dissenting), calculated in the usual way. "If the contingency fee is greater than the statutory fee, plaintiff [and not the defendant] shall pay the difference to his counsel". *Hamner* v. *Rios*, 769 F.2d 1404, 1409 (9th Cir. 1985) (cited with approval in *Delaware Valley II*, *supra*, at 749 (Blackmun, J., dissenting)). This follows because, where the plaintiff has entered into a private contingency agreement with his attorney, "[t]he defendant is not ... required to pay the amount called for in a contingent fee contract if it is more than a reasonable fee calculated in the usual way." *Blanchard* v. *Bergeron*, 489 U.S. 87, 93 (1989). For this reason, the refusal to enhance cross-petitioner's attorney's fee award beyond the lodestar was clearly correct, and should not be disturbed.[6]

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affidavit, that, in the absence of some enhancement to the lodestar (which plaintiff's counsel appeared mistakenly to have believed would have been *his* to keep), he would have been discouraged from taking future cases. As the First Circuit pointed out, plaintiff's attorney here "will in fact be rewarded with a premium in excess of his normal hourly rates", counsel's own definition of the incentive required if he were to take such cases in the future.

[5] Apparently recognizing this defect in the cross-petition, plaintiff urges, remarkably, that the Court "clarify" the issue for contingency cases by jettisoning the "substantial difficulty" requirement by which the current standard for enhancement is defined.

[6] The cross-petition (at p. 7) accuses the District Court, which noted that the case was "not sufficiently rare or exceptional to justify an enhancement of the lodestar", of having misapplied Justice O'Connor's instruction that enhancement decisions, where appropriate, should be based "on the difference in market treatment of contingent fee cases *as a class*, rather than on an assessment of the 'riskiness' of any particular case." *Delaware Valley II*, *supra*, at 731 (O'Connor, J., concurring). The District Court did no such thing. The court's conclusion that there was nothing rare or exceptional about cross-petitioner's case followed immediately on its observation that "the lodestar

B. *There Is No Precedent For Cross-Petitioner's Claim.*

While it is altogether clear under established Supreme Court precedent that any enhancement for contingency would have been inappropriate under the facts of this case, cross-petitioner has adopted a contrary position on the issue that is nothing less than radical. Suggesting that a contingency enhancement should not be merely some addition to or multiplier of the lodestar (such as the 25% enhancement awarded in *Dague*), cross-petitioner argues that courts should use the contingent fee contract itself as the basis for determining the "reasonable attorney's fee" provided by statute. Hazen Paper Company has been unable to locate even a single state or federal court which has adopted this position in the wake of *Delaware Valley II*, and cross-petitioner cites no authority in support of such a proposition.

The dearth of precedent for cross-petitioner's position is hardly surprising in light of this Court's repeated observation that, even in cases where the plaintiff and his attorney have entered into a private contingent contract, "we have adopted the lodestar as the centerpiece of attorney's fee awards. The *Johnson* factors may be relevant in adjusting the lodestar amount[,] but no one factor is a substitute for multiplying reasonable billing rates by a reasonable estimation of the number of hours expended on the litigation." *Blanchard* v. *Bergeron*, *supra*, 489 U.S. at 94. As this Court has noted, Congress expressly rejected "the notion that attorney's fees [under fee-shifting statutes] should be based on private-sector fee arrangements." *Riverside* v. *Rivera*, 477 U.S. 561, 578 n.9 (1986) (plurality opinion). "In most fee-shifting cases . . . the private market model of contingency compensation will provide very little guidance." *Dela-*

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is presumed to be the reasonable fee to which counsel is entitled". The court merely observed that there had been nothing shown to take the present case out of this presumption. Indeed, the District Court expressly acknowledged, in language ignored by the cross-petitioner, that "the Court cannot adjust the lodestar due to the 'legal risk or risks peculiar to the case.' *Id.* at 734 [O'Connor, J., concurring]." (App. at p. 86.)

ware Valley II, *supra*, 483 U.S. at 731 (O'Connor, J., concurring).

The decision identified by this Court in *Blanchard* as supplying the relevant factors for determining any enhancement to the lodestar (in those rare cases where, unlike the present one, enhancement might be necessary to attract competent counsel) itself repudiates the position advocated in the cross-petition. In *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), the court declared:

> "The fee quoted to the client or the percentage of the recovery agreed to is helpful in determining the attorney's fee expectations when he accepted the case. But as pointed out in *Clark* v. *American Marine*, *supra*,
>
> > [t]he statute does not prescribe the payment of fees to the lawyers. It allows the award to be made to the prevailing party. Whether or not he agreed to pay a fee and in what amount is not decisive. Conceivably a litigant . . . might agree to pay his lawyer a percentage contingent fee that would be greater than the fee the court might ultimately set. Such arrangements should not determine the court's decision. The criterion for the court is not what the parties agreed to but what is reasonable."

Id. at 718.

Notwithstanding the total absence of any support in the cases for his position, cross-petitioner seeks to reverse decades of fee-award law, as well as this Court's own recently articulated standards for when enhancement might be appropriate and how it should be determined. In its place, cross-petitioner urges the Court to adopt a long-discredited presumption whereby the terms of a contingent fee contract would provide the basis for an award of counsel fees under the fee-shifting statutes. Such an over-reaching petition neither addresses an important question

of federal law, nor asks the Court to resolve a conflict among the circuits. It should be denied.

C. *The Cross-Petition's Policy Arguments Provide No Basis For The Requested Reversal Of Settled Law.*

Cross-petitioner advances a series of policy arguments purportedly supporting his theory of contingency enhancement. Such arguments for abandoning the standards of fee enhancement adopted by this Court in *Delaware Valley II*, however, and followed by the courts below, are plainly without merit.

First, cross-petitioner suggests that attorneys, having entered into private contingency arrangements, will somehow be deterred from bringing civil rights actions if no fee enhancement is available to them, in light of "the risk for counsel who accepts the case on a contingent basis". *See* Cross-Petition at p. 13. This argument would have merit, however, only if the court's award of fees under a fee-shifting statute served as a ceiling on what the attorney could collect from the prevailing plaintiff. This Court, however, has squarely (and recently) rejected the contention that the reasonable fees awarded under federal fee-shifting statutes should cap payments owed to the prevailing attorney. *See Venegas* v. *Mitchell*, 110 S.Ct. 1679 (1990). In *Venegas*, the Court observed that none of its cases "has indicated that [the civil rights fee-shifting statute], by its own force, protects plaintiffs from having to pay what they have contracted to pay, even though their contractual liability is greater than the statutory award that they may collect from losing opponents." *Id.* at 1684. That is no less true where, due to the presence of a private contingency contract, the fee-shifting statute "would not have authorized the District Court to enhance the statutory award upward from the lodestar figure based on the contingency of non-recovery in this particular litigation." *Id.* at 1682.

Cross-petitioner's other policy argument is that civil rights plaintiffs of limited means will be disadvantaged, contrary to

the intent of the fee-shifting statutes, if they are required to bear any portion of the costs of paying their attorney's fees (*i.e.*, the difference between the court-awarded "reasonable fee" and the amount agreed to in a private contingent fee contract). This argument, however, fails to recognize that the plaintiff who brings his case under a private contingent fee arrangement has received a distinct economic advantage over the plaintiff who hires an attorney on a fixed retainer or an hourly basis: *viz.*, the opportunity to bring a potentially unsuccessful claim at *no* cost whatsoever.

It must be noted in this respect that the plaintiff of means whose attorney's charges exceed the lodestar amount, as is frequently the case, will be required to pay some costs out of pocket even if he prevails, and will be required to pay *all* of his legal expenses if the lawsuit does not succeed. The less affluent plaintiff who brings a claim pursuant to a private contingent fee contract may also have to bear some of the costs of representation — but only if he prevails, and only up to a reasonable portion of the gross recovery.[7]

Relieving plaintiff of any share of the cost of his contingency arrangement would, in effect, grant him the windfall benefit of having been able to bring potentially *unsuccessful* litigation at no cost, with no corresponding burden. This burden, the monetary delta between the lodestar figure and the contingency contract amount, would be borne entirely (and unfairly) by the defendant. Cross-petitioner does not assert (and the record will not support) that, in the absence of a fee enhancement, plaintiff would have failed to bring his claim. Moreover, allowing plaintiff to bear some portion of the contingency payment to which he agreed will hardly undermine the Congressional intent

[7] As this Court has observed, "[c]ivil rights plaintiffs, if they prevail, will be entitled to an attorney's fee that Congress anticipated would enable them to secure reasonably competent counsel. If they take advantage of the system as Congress established it [*i.e.*, by promising to pay the lawyer the statutory award of a reasonable attorney's fee] they will avoid having their recovery reduced by contingent-fee agreements." *Venegas*, *supra*, at 1684.

underlying the fee-shifting statutes — *i.e.*, that meritorious claims not be stalled by the costs of securing competent counsel. *See Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983).

In addition to the foregoing, requiring defendants to pay the costs of any risk contingency built into a private fee contract would, in effect, force defendants to subsidize prevailing attorneys for the costs of bringing other, unsuccessful litigation. This is wrong. "The prevailing party may expect full compensation for prevailing claims; there is no provision for compensating losing, unrelated claims in the same case, or other losing cases which might or might not involve the same parties." *Laffey* v. *Northwest Airlines, Inc.*, 746 F.2d 4, 27-28 (1985), *cert. denied*, 472 U.S. 1021 (D.C. Cir. 1985) (quoted in *Delaware Valley II*, *supra*, at 720). For these reasons, public policy militates strongly against the cross-petitioner's position.

D. *The Record Below Cannot Support The Position Advocated By The Cross-Petition.*

Before the District Court, plaintiff below filed two affidavits of local counsel, to the effect that civil rights and employment discrimination cases are frequently taken by attorneys on a contingency basis. Plaintiff also filed the affidavit of his own attorney, who stated that:

> "I undertook to represent Mr. Biggins on a one-third (⅓) contingency fee basis . . because our risk taking had the potential for reward in excess of our normal hourly rates. If the Court's award of attorneys' fees is limited to payment for hours expended multiplied by our normal hourly rate, then I would be discouraged from taking these types of cases in the future". (Court of Appeals Joint Appendix I, at p. 117.)

As the First Circuit correctly observed, however, nothing in its or the District Court's refusal to enhance the lodestar figure

could serve as a disincentive for counsel to take plaintiff's case, because, under the contingent fee contract, he would "in fact be rewarded with a premium in excess of his normal hourly rates." (App. at p. 47.) Cross-petitioner cannot now seriously contend that the amount his attorneys received under their contingent fee contract would, in future cases, be insufficient to attract competent counsel.

As an alternative argument, cross-petitioner maintains that there is an "inequity" in forcing a plaintiff to bear the difference between the contingent fee amount for which he contracted and the lodestar amount awarded by the court. The Supreme Court, however, has described this *very* argument as "wide of the mark." *Venegas, supra,* at 1684. Furthermore, even if such an inequity did exist, plaintiff fails to indicate that this prospect in any measure discouraged him from bringing suit. In short, there is nothing to suggest that the policy of providing full access to the courts requires any enhancement of the lodestar figure in cases where, as here, the recoverable damages suffice to attract competent counsel to offer their representation on a private contingency fee basis.[8]

E. *The Cross-Petition's Attempt To Ally The Present Case With* Dague *Is Wholly Without Merit.*

In an effort to convince this Court of the merit of his cross-petition, plaintiff attempts to portray the present case as "an appropriate compliment [sic] to *Dague* [v. *Burlington*, 935 F.2d 1343 (2d Cir. 1991)]", a case where certiorari was recently granted. Notwithstanding cross-petitioner's assertion that "[t]his case presents the same question as presented in *Dague*", however, the two cases are in fact quite different. Indeed, they

[8] Nor do the two affidavits of local counsel assist the plaintiff in this regard. That employment discrimination cases are commonly taken by attorneys on the basis of contingent fee contracts indicates precisely that the potential damages awards in these cases *are* sufficient to attract counsel *without* the prospect of further fee enhancement.

are distinguishable by the very distinction identified by every member of this Court in *Delaware Valley II*.

In *Dague*, the award of attorney's fees came after a finding of liability, but before any trial on the issue of damages. *Dague*, *supra*, 935 F.2d at 1347. Thus, in *Dague*, the payment of any attorney's fee depended entirely on the court's awarding some enhancement for the risk of non-payment, because there were no damages upon which a private contingency fee contract sufficient to attract competent counsel could have been based. *Dague* is thus precisely the kind of case which at least the dissenters in *Delaware Valley II* believed might require the availability of enhancement as a means of securing counsel, *viz.*, one where "[w]ithout the possibility of a fee enhancement competent counsel might refuse to represent clients, thereby denying them effective access to the courts." *Dague*, *supra*, at 1360 (internal citations omitted).

In the present case, by contrast, counsel was attracted not by the chance of court-awarded fee enhancement, but by the possibility of sharing in a substantial damages recovery, as, ultimately, he did. There is no suggestion in the record that the absence of an enhancement would have caused plaintiff to face any "substantial difficulty in obtaining counsel of reasonable skill and competence". *Dague*, *supra*, at 1360. This case, then, belongs to that class of litigation found by both the plurality and the dissent in *Delaware Valley II* as meriting only an award of reasonable attorney's fees calculated in the usual way. As such, it is hardly an appropriate complement to *Dague*.

In addition, the enhancement sought in *Dague*, *i.e.*, an additional 25% of the lodestar figure, is consistent with the methodology contemplated in *Delaware Valley II*. The wholesale abandonment of the lodestar method advocated by the cross-petition, by contrast, is not only without precedent in the law since *Delaware Valley II*, it is flatly at odds with *Dague* itself. The present case is thus hardly an appropriate one to pair with the Court's consideration of *Dague*, and cross-petitioner's facially meritless claims are in no way complementary to the important issues raised by *Dague*.

Conclusion

For all of the foregoing reasons, the Cross-Petition for Certiorari should be denied.

Respectfully submitted,

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